(3)

No. 06-1369

FILED
AUG 27 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

EUSEBIO GUEVARA,

Petitioner,

v.

ALBERTO R. GONZALES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY FOR PETITIONER

CHARLES ROTH
NATIONAL IMMIGRANT JUSTICE CENTER
208 S. LaSalle Street
Suite 1818
Chicago, IL 60608
(312) 660-1613

BRIAN J. MURRAY
(*Counsel of Record*)
NICOLE C. HENNING
JONES DAY
77 W. Wacker Drive
Suite 3500
Chicago, IL 60601
(312) 782-3939

GREGORY A. CASTANIAS
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 2

I. THE CURRENT JURISPRUDENCE OF THE COURTS OF APPEALS IS IN CONFLICT WITH THE STATUTORY AND REGULATORY SCHEME GOVERNING IMMIGRATION CASES 3

II. THE OPINIONS OF THE COURTS OF APPEALS THREATEN SUBSTANTIAL CONFUSION REGARDING THE PROPER APPELLATE PROCEDURE FOR IMMIGRATION CASES 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

In re Duarte, 18 I. & N. Dec. 329 (BIA 1982) 5
FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 4
Jackson v. United States, 463 F.3d 635 (7th Cir. 2006) 8
In re Lok, 18 I. & N. Dec. 101 (BIA 1981) 5
Lolong v. Gonzales, 484 F.3d 1173 (9th Cir. 2007) 7, 8
Molina-Camacho v. Ashcroft, 393 F.3d 937 (9th Cir. 2004) 7, 8
Saldarriaga v. Gonzales, 402 F.3d 461 (4th Cir. 2005), *cert. denied*, 546 U.S. 1169 (2006) 9
Sosa-Valenzuela v. Gonzales, 483 F.3d 1140 (10th Cir. 2007) 5
Zahren v. Gonzales, 487 F.3d 1039 (7th Cir. 2007) 9

Statutes & Regulations

8 U.S.C. § 1101(a)(47) ..... *passim*
8 U.S.C. § 1101(a)(47)(B)(ii) 3
8 U.S.C. § 1182(a) 4
8 U.S.C. § 1182(c) (1995) 4
8 U.S.C. § 1252(a) 7
8 U.S.C. § 1252(a)(1) 9
8 C.F.R. § 1.1(p) 4
8 C.F.R. § 1103.39 3

Miscellaneous Authorities

EOIR Statistical Yearbook, available at http://www.usdoj.gov/eoir/statspub/fy06syb.pdf 10
ROBERT L. STERN, ET AL. SUPREME COURT PRACTICE (8th ed. 2002) 2

REPLY FOR PETITIONER

In this case, the Seventh Circuit joined the Second, Fifth, and Eighth Circuits (in acknowledged conflict with the Ninth Circuit) in their interpretations of the term "order of deportation" under 8 U.S.C. § 1101(a)(47). The Court below held, contrary to plain statutory language and in a way that does violence to the integrity of immigration law as a whole, that an IJ's finding that an alien is removable—even where the IJ ultimately grants discretionary relief and orders that the alien not be removed—is the same thing as an "order of deportation." (Pet. App. 7a-8a.) At a minimum, this approach permits the Courts of Appeals to reach beyond classic final "order[s] of deportation" and adjudicate myriad petitions for review that otherwise would be beyond their jurisdiction. They are, in fact, already doing so. Worse, this approach would—if taken literally—require aliens to file *two* piecemeal appeals to the BIA in nearly every immigration case (and *two* later petitions in a federal Court of Appeals in each such case) to preserve their rights: one on the finding of removability (now termed an "order of deportation"), and one on the final order either granting discretionary relief or ordering that the alien be removed.

After the Petition was filed, the Ninth Circuit overruled itself *en banc*, joining the Seventh Circuit and the others in their statutory misinterpretation. The Ninth Circuit, which adjudicates nearly half of all petitions for review of immigration decisions filed in the federal appellate courts (Pet. at 13 & n.2), has thus now joined a school of thought that is not only wrong as a matter of statutory interpretation, but that threatens to deluge the federal Courts of Appeals with multiple petitions for review of BIA decisions—and indeed, is already beginning to do so. Far from fixing the problem raised in the petition by eliminating a Circuit split, the Ninth Circuit's decision further enshrines (and thus exacerbates) the problem. Indeed, by resolving the split as it has, the Ninth Circuit has actually increased the importance of this issue. For one thing, it will now affect the significant

number of immigration cases arising in the Nine Western States. For another thing, the Circuits that have spoken are now unanimous as to their ability to review BIA cases outside of their statutorily-established jurisdiction. The Courts of Appeals are already exercising this expanded jurisdiction to hear more petitions for review of BIA decisions. And the number of these cases only threatens to increase as cautious aliens, taking the law as it now exists seriously, file ever-more numerous piecemeal BIA appeals (and subsequent federal court petitions for review).

Further percolation of this issue is thus unlikely to provide additional considered analysis. This Court's corrective action is urgently needed now. *See* ROBERT L. STERN, ET AL. SUPREME COURT PRACTICE 247 (8th ed. 2002) (noting that certiorari is appropriate when the issue of statutory construction is important, importance being shown, inter alia, by "the significance of the issue in the administration of the statute" and "the serious hindrance to the effective administration of the law caused by the lower court decision"). The Petition should be granted.

ARGUMENT

The Government's argument in opposition to certiorari largely ignores petitioner's showing that the Seventh Circuit's equating of a finding of removability with an "order of deportation" cannot be squared with either the plain language of the relevant statute, or the immigration statutory and regulatory scheme as a whole. (*See* Pet. at 20-24.) Instead, the Government urges denial of the Petition on two grounds. *First*, the Government asks the Court to focus on the "plain language" of 8 U.S.C. § 1101(a)(47)(A), and ignore the rest of the statutory and regulatory scheme governing immigration. *Second*, the Government contends that, since no mass confusion has yet resulted, this Court should simply ignore the legal error now uniformly embraced by the Courts of Appeals. Neither contention has merit.

I. THE CURRENT JURISPRUDENCE OF THE COURTS OF APPEALS IS IN CONFLICT WITH THE STATUTORY AND REGULATORY SCHEME GOVERNING IMMIGRATION CASES.

1. The Government first argues that the "plain language" of 8 U.S.C. § 1101(a)(47)(A) supports what the BIA did here, ordering petitioner's removal from the United States. Even the Government does not contend that the BIA has the power to order such removal in the first instance. (Pet. at 20-21.) Instead, it simply repeats the conclusion of the court below, that an IJ's finding of removability itself constitutes an "order of deportation" that the BIA is free to affirm. (Opp. Br. at 7.) If proper statutory interpretation focused on words in isolation, without regard for the fuller context of the statute, then perhaps Government's reading would be plausible. But it cannot be sustained—especially on a fuller examination of the framework of immigration law as a whole—for three reasons.

First, even on its own terms, this isolationist approach to statutory interpretation, when taken to its logical conclusion, would produced absurd results. If a finding of removability is the same thing as an order of deportation under § 1101(a)(47)(A), that "order of deportation" would become final if not appealed within 30 days. 8 U.S.C. § 1101(a)(47)(B)(ii); 8 C.F.R. § 1103.39. But a finding of removability is a prerequisite for almost every form of relief from removal. (Pet. at 5-6.) Thus, under the Government's "plain meaning" interpretation, any time an alien is granted relief from removal (meaning he can stay here), and the Government chooses not to appeal the IJ's decision, the alien would nonetheless be subject to a "final order of removal" 30 days later—even though the effect of that "final order of removal" is that the alien is *not* ordered removed. The government's "plain language" reading of the statute, when examined closely, is anything but plain.

Second, the Government's preferred construction of § 1101(a)(47)(A) cannot be squared with related provisions of the immigration code and regulations. (Pet. at 23-24.) Perhaps that is why the Government so desperately contends that only § 1101(a)(47)(A) should be consulted here, and the rest of immigration law should be ignored. (Opp. Br. at 7 n.3.) But "it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," and "[a] court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations and internal quotation marks omitted).

Indeed, the Government's construction would vitiate the entire category of § 212(c) relief that petitioner sought in this case. According to that statute, "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General[.]" *See* 8 U.S.C. § 1182(c) (1995). Yet, removability is a precondition for a grant of cancellation of removal to both lawful permanent residents and non-residents. *Id.* § 1182(a). And, by regulation, lawful permanent residents lose their status as lawful permanent residents (and thus their "lawful . . . domicile") upon entry of a final order of removal. 8 C.F.R. § 1.1(p). Accordingly, under the Government's reading of § 1101(a)(47)(A), when a lawful permanent resident is found to be removable (and does not appeal that finding within 30 days, as typically happens in a protracted proceeding where removability and relief from removal are separated in time by months or years (Pet. at 6, 25)), he becomes subject to a "final order of deportation," and thus loses both his lawful permanent resident status and his ability to apply for § 212(c) relief—regardless of whether any of his discretionary claims have

been addressed. *See In re Lok*, 18 I. & N. Dec. 101 (BIA 1981); *In re Duarte*, 18 I. & N. Dec. 329 (BIA 1982). That is, the Government's statutory construction renders § 212(c) relief a cipher—a nullity.

Third, the Government's reading conflates the BIA's uncontested substantive power to reverse a finding of removability or eligibility for cancellation of removal on appeal with the procedural power to issue the order of removal that results from such a reversal. (Pet. at 21-22.) While the Government implies that institutional competence is simply not important in an agency context generally (claiming, with no precedential citation, that the "norm in administrative practice" is for an appellate body to render a dispositive decision), the argument ignores the clear statutory language mandating that, in the immigration context specifically, a final order of deportation may *not* be issued in the first instance by the BIA. *(Id.* at 20-21.) Indeed, the Tenth Circuit squarely rejected a similar argument that the statutory scheme at issue here permits the BIA to enter an order of deportation in the first instance. *Sosa-Valenzuela v. Gonzales*, 483 F.3d 1140, 1145 (10th Cir. 2007) ("As a threshold matter, the statutory scheme does not grant the BIA the independent authority to conduct removal proceedings. Removal proceedings are authorized by statute and in the first instance are conducted only by immigration judges.").[1]

---

[1] Interestingly, although the Government ignores the holding of *Sosa-Valenzuela* when arguing for a "common sense" interpretation of Section 1101(a)(47)(A), it is willing to cite the case's *dictum* as an authoritative holding one page later. (Opp. Br. at 9) As the Tenth Circuit made clear in that case, it was not considering a situation like the one here, where the IJ made a finding of removability, then granted a relief from removal that was later reversed by the BIA. *See Sosa-Valenzuela*, 483 F.3d at 1146. Thus, nothing in that case can properly be considered a holding "that the BIA may order an alien removed if the IJ has found the alien removable but granted relief from removal[.]" (Opp. Br. at 9.)

Moreover, institutional competence within this statutory scheme is about more than a technical reading of the statute. Two principal inquiries govern whether an alien is allowed to stay in this country: (1) the legal question of whether the alien is removable, and if so, (2) a discretionary inquiry into whether he should in fact be removed. (Pet. at 5-6.) The now-uniform view of the Courts of Appeals that have addressed the issue strips the alien of the opportunity, after a successful government appeal, to prove, based on the typically discretionary and equitable "totality of the circumstances," that while legally removable, he should not be removed, even in light of the BIA's analysis of the particular factors initially relied upon by the IJ. The result would be to deprive a petitioner of a full opportunity to litigate his right to discretionary relief, which is typically the only substantive issue in immigration cases.

This underscores why the Government is wrong to suggest that institutional competence in this case can be disregarded because, even assuming that the BIA does not have the power to order removal, "a decision by this Court will not affect [petitioner]'s ultimate removal from the United States." (Opp. Br. at 11.) This view of petitioner's prospects on remand ignores two key points.

First, when the BIA considered petitioner's case, it declared that rehabilitation was a "neutral factor." (Pet. App. 11a.) Two years have now passed since the BIA's opinion, during which petitioner has not engaged in any criminal conduct; that should positively affect the equitable analysis concerning rehabilitation. In addition, remand would afford petitioner the opportunity to better explain his remorse for his prior actions and take responsibility for them. Both individually and cumulatively, these considerations would dramatically change the discretionary landscape for addressing petitioner's eligibility for § 212(c) relief.

Second, a page of the transcript of the IJ's initial grant of relief from removal had gone missing by the time this case

went before the BIA. That page contained the bulk of the IJ's discussion of the factors weighing in favor of granting relief from removal. Accordingly, following a remand to the IJ, the BIA would have a fuller picture of the reasons petitioner should be allowed to stay in the country than it did when first ruling on his case. This, too, should cause the balance of equities to tip in petitioner's favor on the discretionary question of § 212(c) relief.

2. The cases upon which the Government's argument relies similarly (and wrongfully) ignore the statutory and regulatory scheme as a whole. Most were discussed in the Petition and need not be revisited here. Indeed, only a single case that the Government cites, the Ninth Circuit's recent *en banc* opinion in *Lolong v. Gonzales*, 484 F.3d 1173 (9th Cir. 2007), even attempts to consider the entire immigration scheme. Yet even that opinion omits mention of all the statutes and regulations that conflict with the court's view.

In *Lolong*, perhaps because neither party was advocating in favor of the court's prior (and correct) decision in *Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004), which created the Circuit split discussed in the Petition, the Ninth Circuit determined that *Molina-Camacho*, in conjunction with a new provision in the REAL ID Act, would create a "limbo" in which an alien could be subject to a void order of removal but have no judicial remedy. *Id.* at 1176-77. In part to avoid the constitutional problems associated with such a situation, the court overturned its holding in *Molina-Camacho*. *Id.* This concern was, however, unfounded.

The *Lolong* court began its analysis by noting that, under 8 U.S.C. § 1252(a), jurisdiction in the court of appeals is limited to review of final orders of removal. *Lolong*, 484 F.3d at 1176. The court then acknowledged that under the REAL ID Act, "'a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act[.]'" *Id.* (quoting 8 U.S.C. § 1252(a)(5) (ellipsis in original)).

Reading these two provisions side-by-side, the court was concerned that because the REAL ID Act precluded collateral review of orders of removal in the district court, any *ultra vires* act by the BIA would leave an alien with no avenue of recourse. *Id.* at 1177.

This logic, though, ignores *Molina-Camacho*'s sound conclusion that an *ultra vires* order from the BIA is a "legal nullity." *Molina-Camacho*, 393 F.3d at 942. Because the BIA's action cannot properly be characterized as *any* legal action, let alone an "order of removal . . . entered or issued under any provision of [Title 8 of the United States Code]," it remains cognizable as a habeas claim in district court. Habeas review would only be precluded if one assumes the conclusion of the argument—that the BIA can issue an order of removal under the terms of the statutory and regulatory scheme, or that the IJ had already entered a valid order of removal. That the BIA might label its action a "final order of removal" does not mean it would be so. *Cf. Jackson v. United States*, 463 F.3d 635, 639 (7th Cir. 2006) ("Call it a motion for a new trial, arrest of judgment, mandamus, prohibition, *coram nobis*, *coram vobis*, *audita querela*, certiorari, capias, habeas corpus, ejectment, *quare impedit*, bill of review, writ of error, or an application for a Get-Out-of-Jail Card; the name makes no difference. It is substance that controls."). The Ninth Circuit's logic simply cannot withstand scrutiny.

II. THE OPINIONS OF THE COURTS OF APPEALS THREATEN SUBSTANTIAL CONFUSION REGARDING THE PROPER APPELLATE PROCEDURE FOR IMMIGRATION CASES.

The logic of the Seventh Circuit's view regarding what constitutes an "order of deportation" under 8 U.S.C. § 1101(a)(47)(A) also threatens broader practical ramifications for an already overtaxed immigration system. This reasoning is already permitting the federal Courts of Appeals to reach beyond their statutorily-limited jurisdiction to review a host of BIA decisions that are not, under a proper

understanding, final "order[s] of deportation." Worse, if this Court does not reverse the current trend in this area of jurisprudence, mass confusion and needless inefficiency will result. (Pet. at 24-29.) The Government's response, an assertion that the issue has not yet caused mass confusion, is cold comfort given what has already happened, and what the logic of these decisions compels. (Opp. Br. at 11.)

First, treating a finding of removability as an "order of deportation" has already had an impact on the workload of the Courts of Appeals. This is a case in point: Under a proper understanding of "order of deportation" (now referred to as an order of "removal"), which requires an IJ order actually mandating that an alien *be removed* (as opposed to a simple finding of removability conjoined with a discretionary grant of relief from removal), this case could never have been heard by the Seventh Circuit, whose jurisdiction is limited to "review [of] . . . a final order of removal[.]" 8 U.S.C. § 1252(a)(1). Here, the IJ found petitioner removable, but granted him discretionary § 212(c) relief, and the BIA reversed the discretionary grant. The BIA should have remanded to the IJ for further consideration and, if appropriate, entry of a final order *both* finding petitioner removable *and* actually ordering him removed. The Seventh Circuit should have not have reviewed the combined work of the IJ and the BIA without such an order from the IJ in place.

Worse, other Courts of Appeals are going even further beyond the bounds of their jurisdiction to review BIA decisions. Indeed, some courts are reviewing such decisions when the BIA has actually *ordered remand* to the IJ to consider additional discretionary relief and enter an appropriate "order of deportation" to give the Courts of Appeals jurisdiction. *See, e.g.*, *Zahren v. Gonzales*, 487 F.3d 1039, 1140 & n.2 (7th Cir. 2007) (rejecting Government's challenge to jurisdiction where the BIA had remanded for consideration of voluntary departure); *Saldarriaga v. Gonzales*, 402 F.3d 461, 465-66 (4th Cir. 2005) (collecting

cases), *cert. denied*, 546 U.S. 1169 (2006). Thus, the Government's arguments notwithstanding, the logic of the court below (which commands the assent of all courts of appeals to have considered the issue) is *already* increasing the workload of the federal Courts of Appeals.

Second, although the Government asks this Court to ignore the logically inescapable consequences of the Seventh Circuit's flawed reasoning in the hope that they never occur, this is wishful thinking. Leaving the current rule intact requires cautious, prudent immigration counsel to advise clients to conduct themselves as if a finding of removability were an "order of deportation" within the meaning of Section 1101(a)(47). (*See* Pet. at 25-26.) Accordingly, the now-ascendant interpretation of § 1101(a)(47) requires early and multiple appeals to the BIA (and later petitions for review in federal court) in *every kind* of immigration matter requiring a threshold determination of removability before a later question of eligibility for relief can be addressed. That, in turn, will inevitably lead to the adverse consequences detailed in the Petition. (Pet. at 26-28.) (The BIA, after all, *already* decides over 40,000 appeals per year. (*EOIR Statistical Yearbook*, at S2, *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf).)

Like the cautious alien, this Court should not be willing to gamble that the current quietly illogical trend of ignoring the 30-day appellate timeline for one sort of "order of deportation" (a finding of removability) but not the other (an actual order of removal) will continue indefinitely. That is especially so now that the Ninth Circuit, which until recently had refused to adopt this inefficient rule, has now joined the rest of the Circuits in adhering to it—and that Circuit alone adjudicates nearly half of all petitions for review of BIA decisions filed in the federal courts of appeals. (Pet. at 13 & n.2.) Only this Court's review can guarantee that needless confusion and inefficiency will be avoided.

CONCLUSION

The petition should be granted.

Respectfully submitted,

CHARLES ROTH
NATIONAL IMMIGRANT
JUSTICE CENTER
208 S. LaSalle Street
Suite 1818
Chicago, IL 60608
(312) 660-1613

BRIAN J. MURRAY
(Counsel of Record)
NICOLE C. HENNING
JONES DAY
77 W. Wacker Drive
Suite 3500
Chicago, IL 60601
(312) 782-3939

GREGORY A. CASTANIAS
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioner

August 27, 2007